



## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34-92546; File Nos. SR-CBOE-2021-023; SR-CboeBYX-2021-009; SR-CboeBZX-2021-028; SR-CboeEDGA-2021-009; SR-CboeEDGX-2021-021; SR-C2-2021-007] Self-Regulatory Organizations; Cboe Exchange, Inc.; Cboe BYX Exchange, Inc.; Cboe BZX Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX Exchange, Inc.; Cboe C2 Exchange, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1, to Amend the Sixth Amended and Restated Bylaws of Cboe Global Markets, Inc. to Implement Proxy Access**

August 2, 2021.

### I. Introduction

On April 16, 2021, each of Cboe Exchange, Inc. (“Cboe”), Cboe BYX Exchange, Inc. (“BYX”), Cboe BZX Exchange, Inc. (“BZX”), Cboe EDGA Exchange, Inc. (“EDGA”), and Cboe EDGX Exchange, Inc. (“EDGX”), and on April 26, 2021, Cboe C2 Exchange, Inc. (“C2” and together with Cboe, BYX, BZX, EDGA, and EDGX, the “Exchanges”) filed with the Securities and Exchange Commission (“Commission”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend the Sixth Amended and Restated Bylaws (“Bylaws”) of their parent company, Cboe Global Markets, Inc. (“CGM”), to implement proxy access. The proposed rule changes were published for comment in the Federal Register on May 5, 2021.<sup>3</sup> No comment letters were

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release Nos. 91728 (April 29, 2021), 86 FR 24052 (SR-CBOE-2021-023); 91729 (April 29, 2021), 86 FR 24059 (SR-CboeBYX-2021-009); 91727 (April 29, 2021), 86 FR 24083 (SR-CboeBZX-2021-028); 91725 (April 29, 2021), 86 FR 24076 (SR-CboeEDGA-2021-009); 91724 (April 29, 2021), 86 FR 24044 (SR-

received in response to the proposals. On July 28, 2021, each of BYX, BZX, EDGA, EDGX and C2, and on July 29, 2021, Cboe filed Amendment No. 1 to the proposed rule changes (collectively, “Amendment Nos. 1”).<sup>4</sup> This order provides notice of filing of Amendment Nos. 1 and approves the proposed rule changes, as modified by Amendment Nos. 1, on an accelerated basis.

## II. Description of the Proposed Rule Changes, as Modified by Amendment Nos. 1

The Exchanges state that CGM received a stockholder proposal submitted pursuant to Rule 14a-8 under the Act which requested that the Board of Directors of CGM (“Board”) take steps to implement a “proxy access” bylaw provision to allow a stockholder, or group of stockholders, who comply with certain requirements, to nominate candidates for service on the Board and have those candidates included in CGM’s proxy materials.<sup>5</sup> The Exchanges state that CGM has determined to take the stockholder’s requested steps to implement proxy access and, accordingly, the Exchanges have submitted this proposal to adopt new Section 2.16 of the

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CboeEDGX-2021-021); 91732 (April 29, 2021), 86 FR 24125 (SR-C2-2021-007) (collectively, “Notices”).

<sup>4</sup> In Amendment Nos. 1, the Exchanges clarified the circumstances under which proxy access nominees may be excluded from the proxy materials. Pursuant to proposed Section 2.16(j)(i) of the Bylaws, CGM would not be required to include a Stockholder Nominee in its proxy materials who would not be an independent director under Section 3.3 of the Bylaws, under the rules of the principal national securities exchange on which the outstanding capital stock of CGM is traded, any applicable rules of the Commission and any publicly disclosed standards used by the Board in determining and disclosing independence of CGM’s directors, in each case as determined by the Board in its sole discretion. In Amendment Nos. 1, the Exchanges represented that any independence standards adopted by CGM’s Board will apply uniformly to all director nominees, including Stockholder Nominees, and that any future independence standards adopted by the Board will comply with all applicable laws, rules, and regulations. Amendment Nos. 1 are available on the Commission’s website at <http://www.sec.gov/rules/sro.shtml>.

<sup>5</sup> See Notices, supra note 3, at 24052, 24059, 24083, 24076, 24045, and 24125, respectively. See also 17 CFR 240.14a-8 (establishing procedures pursuant to which stockholders of a public company may have their proposals placed alongside management’s proposals in the company’s proxy materials for presentation to a vote at a meeting of stockholders).

Bylaws.<sup>6</sup> Subject to procedures and conditions set forth therein, and as further described below, proposed Section 2.16 of the Bylaws would generally permit a stockholder, or group of up to 20 stockholders, to nominate director nominees for the Board and have such director nominees included in CGM's annual meeting proxy materials, so long as the stockholder(s) have owned at least three percent of CGM's outstanding shares of capital stock continuously for at least three years.<sup>7</sup> The proposal would limit the number of proposed director nominees to the greater of (i) two or (ii) 20% of the number of CGM directors in office (rounded down to the nearest whole number, but no less than two).<sup>8</sup> The Exchanges note that the parent companies of other national securities exchanges have adopted substantively similar proxy access provisions, and the Exchanges state that they do not believe such provisions are materially different from the proxy access provision proposed by the Exchanges.<sup>9</sup>

#### Proposed Section 2.16 of the Bylaws

Specifically, proposed Section 2.16(a) of the Bylaws would require that, subject to the provisions of proposed Section 2.16, whenever the Board solicits proxies with respect to the election of directors at an annual meeting of stockholders, CGM must include in its proxy statement for such annual meeting, in addition to any persons nominated for election by or at the direction of the Board, the name, together with the "Required Information," of any person nominated for election to the Board as a director by an "Eligible Stockholder" (defined below)

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<sup>6</sup> See Notices, supra note 3, at 24052, 24059-60, 24083-84, 24076, 24045, and 24125, respectively. The Exchanges also propose to make conforming changes to current Sections 2.10 and 2.11 of the Bylaws. See id. at 24052, 24059, 24083, 24076, 24045, and 24125, respectively. See also infra notes 45-46.

<sup>7</sup> See proposed Bylaws Section 2.16.

<sup>8</sup> See proposed Bylaws Section 2.16(c).

<sup>9</sup> See Notices, supra note 3, at 24052, 24059-60, 24083-84, 24076, 24045, and 24125, respectively (citing to Securities Exchange Release Nos. 79357 (November 18, 2016), 81 FR 85283 (November 25, 2016) (SR-NASDAQ-2016-127; SR-BX-2016-051; SR-ISE-2016-22; SR-ISEGemini-2016-10; SR-ISEMercury-2016-16; SR-PHLX-2016-93; SR-BSECC-2016-001; SR-SCCP-2016-01); and 77782 (May 6, 2016), 81 FR 29600 (May 12, 2016) (SR-NYSE-2016-14; SR-NYSEArca-2016-25; SR-NYSEMKT-2016-20)).

(“Stockholder Nominee”). The “Required Information” to be included in the proxy statement is (i) the information provided to CGM’s Secretary concerning the Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in CGM’s proxy statement pursuant to Section 14 of the Act and the rules and regulations promulgated thereunder and, (ii) if the Eligible Stockholder so elects, a “Supporting Statement,” which is a written statement, not to exceed 500 words, in support of its Stockholder Nominee(s)’ candidacy.<sup>10</sup> The proposal would also require that the name of any Stockholder Nominee included in CGM’s proxy statement for an annual meeting of stockholders be set forth on the form of proxy and any ballot distributed by CGM in connection with such annual meeting.<sup>11</sup> In addition to any other applicable requirements, for a nomination to be made by an Eligible Stockholder under proposed Section 2.16 of the Bylaws, the Eligible Stockholder must give timely notice to CGM thereof (a “Notice of Proxy Access Nomination”) and must expressly request in such notice to have its nominee included in CGM’s proxy materials.<sup>12</sup>

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<sup>10</sup> See proposed Bylaws Sections 2.16(a) and (h). See also *infra* note 28 and accompanying text.

<sup>11</sup> Proposed Section 2.16(a) states that, for the avoidance of doubt, nothing in the proposal will limit CGM’s ability to solicit against any Stockholder Nominee or include in its proxy materials CGM’s own statements or other information relating to any Eligible Stockholder or Stockholder Nominee, including any information provided to CGM pursuant to proposed Section 2.16.

<sup>12</sup> See proposed Bylaws Section 2.16(b). Proposed Section 2.16(b) requires that a Notice of Proxy Access Nomination must be delivered not earlier than the open of business on the 150th day and not later than the close of business on the 120th day prior to the first anniversary of the date that CGM first distributed its proxy statement to stockholders for the preceding year’s annual meeting of stockholders provided, however, that in the event the annual meeting is more than 30 days before or after the anniversary date of the prior year’s annual meeting, or if no annual meeting was held in the preceding year, to be timely, the Notice of Proxy Access Nomination must be received by CGM no earlier than 150 days before such annual meeting and no later than the later of 120 days before such annual meeting or the 10th day following the day on which public announcement (as defined in Section 2.11 of the Bylaws) of the date of such meeting is first made by CGM. Proposed Section 2.16(b) further provides that in no event shall any adjournment or postponement of an annual meeting or the announcement thereof commence a new time period (or extend any time period) for the giving of a Notice of Proxy Access Nomination.

An “Eligible Stockholder” is defined as a stockholder or group of no more than 20 stockholders<sup>13</sup> that (i) has Owned continuously for at least three years (“Minimum Holding Period”) at least three percent of the outstanding shares of capital stock of CGM as of the date the Notice of Proxy Access Nomination is received by CGM (“Required Shares”), (ii) continues to Own the Required Shares through the date of the annual meeting, and (iii) meets all other requirements of the proposed Section 2.16.<sup>14</sup> Proposed Section 2.16(e) of the Bylaws sets forth when a stockholder would be deemed to “Own” shares of CGM’s capital stock, and provides that whether outstanding shares of CGM’s capital stock are “Owned” shall be determined by the Board.<sup>15</sup>

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<sup>13</sup> Proposed Section 2.16(d) states that any two or more funds that are part of the same “Qualifying Fund Group” will be counted as one stockholder, and defines a “Qualifying Fund Group” as two or more funds that are (i) under common management and investment control, (ii) under common management and funded primarily by the same employer, or (iii) a “group of investment companies” as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Corporation Act of 1940, as amended.

<sup>14</sup> See proposed Bylaws Section 2.16(d). Proposed Section 2.16(d) further provides that whenever the Stockholder consists of a group, (i) each provision of proposed Section 2.16 that requires the Eligible Stockholder to provide any written statements, representations, undertakings, agreements or other instruments or to meet any other conditions will be deemed to require each stockholder (including each individual fund) that is a member of such group to provide such statements, representations, undertakings, agreements or other instruments and to meet such other conditions (except that the members of such group may aggregate the shares that each member has Owned continuously for the Minimum Holding Period in order to meet the three percent Ownership requirement of the “Required Shares” definition) and (ii) a breach of any obligation, agreement or representation under proposed Section 2.16 by any member of such group shall be deemed a breach by the Eligible Stockholder. Proposed Section 2.16(d) also prohibits any stockholder from being a member of more than one group of stockholders constituting an Eligible Stockholder with respect to any annual meeting.

<sup>15</sup> Under proposed Section 2.16(e) of the Bylaws, a stockholder will be deemed to “Own” only those outstanding shares of CGM’s capital stock as to which the stockholder possesses both: (i) the full voting and investment rights pertaining to the shares; and (ii) the full economic interest in (including the opportunity for profit from and risk of loss on) such shares; provided that the number of shares calculated in accordance with clauses (i) and (ii) shall not include any shares that are (1) sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed; (2) borrowed by such stockholder or any of its affiliates for any purposes or purchased by such stockholder or any of its affiliates pursuant to an agreement to resell; or (3) subject to any option, warrant, forward contract, swap, contract of sale, other derivative or similar instrument or agreement entered into by such stockholder or any of its affiliates, whether any such instrument or agreement is to be settled with shares or with cash based on the notional

Proposed Section 2.16(c) of the Bylaws provides that the maximum number (“Permitted Number”) of Stockholder Nominees nominated by all Eligible Stockholders that will be included in CGM’s proxy materials with respect to an annual meeting of stockholders will not exceed the greater of (i) two or (ii) 20% of the number of directors in office as of the last day on which a Notice of Proxy Access Nomination may be delivered pursuant to and in accordance with proposed Section 2.16 (the “Final Proxy Access Nomination Date”) or, if such amount is not a whole number, the closest whole number below 20%. Proposed Section 2.16(c) sets forth certain circumstances under which the Permitted Number would be reduced.<sup>16</sup> Proposed Section 2.16(c)

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amount or value of outstanding shares of CGM’s capital stock, in any such case which instrument or agreement has, or is intended to have, the purpose or effect of: (A) reducing in any manner, to any extent or at any time in the future, such stockholder’s or its affiliates’ full right to vote or direct the voting of any such shares; and/or (B) hedging, offsetting or altering to any degree any gain or loss realized or realizable from maintaining the full economic ownership of such shares by such stockholder or affiliate. Proposed Section 2.16(e) further provides that a stockholder shall “Own” shares held in the name of a nominee or other intermediary so long as the stockholder retains the right to instruct how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares. Under proposed Section 2.16(e), a stockholder’s Ownership of shares shall be deemed to continue during any period in which (i) the stockholder has loaned such shares, provided that the stockholder has the power to recall such loaned shares on five business days’ notice and includes in the Notice of Proxy Access Nomination an agreement that it will (1) promptly recall such loaned shares upon being notified that any of its Stockholder Nominees will be included in CGM’s proxy materials and (2) will continue to hold such shares through the date of the annual meeting or (ii) the stockholder has delegated any voting power by means of a proxy, power of attorney or other instrument or arrangement which is revocable at any time by the stockholder.

<sup>16</sup> Proposed Section 2.16(c) provides that in the event one or more vacancies on the Board occurs with respect to any directors for any reason after the Final Proxy Access Nomination Date but before the date of the annual meeting and the Board resolves to reduce the size of the Board in connection therewith, the Permitted Number will be calculated based on the number of directors in office as so reduced. In addition, the Permitted Number will be reduced by (i) the number of individuals who will be included in CGM’s proxy materials as director nominees recommended by the Board pursuant to an agreement, arrangement or other understanding with a stockholder or group of stockholders (other than any such agreement, arrangement or understanding entered into in connection with an acquisition of stock from CGM by such stockholder or group of stockholders) and/or (ii) the number of directors in office as of the Final Proxy Access Nomination Date who were included in CGM’s proxy materials as Stockholder Nominees for any of the two preceding annual meetings of stockholders and whose reelection at the upcoming annual meeting is being recommended by the Board.

also sets forth procedures for determining when the Permitted Number is reached and for selecting candidates when the Permitted Number is exceeded.<sup>17</sup> Proposed Section 2.16(c) also specifies that CGM will not be required to include any Stockholder Nominees in its proxy materials pursuant to Section 2.16 for any meeting of stockholders for which CGM receives a notice (whether or not subsequently withdrawn) that the Eligible Stockholder or any other stockholder intends to nominate one or more persons for election to the Board pursuant to Section 2.11 of the Bylaws.

Proposed Section 2.16(f) sets forth the information that an Eligible Stockholder must include in its Notice of Proxy Access Nomination, and includes, among other things:<sup>18</sup> (i) a statement by the Eligible Stockholder (1) setting forth and certifying as to the number of shares it

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<sup>17</sup> Proposed Section 2.16(c) provides that for purposes of determining when the Permitted Number has been reached, any individual nominated by an Eligible Stockholder for inclusion in CGM's proxy materials pursuant to Section 2.16 whose nomination is subsequently withdrawn or whom the Board decides to nominate for election to the Board as a director will be counted as one of the Stockholder Nominees. Proposed Section 2.16(c) also provides that any Eligible Stockholder submitting more than one Stockholder Nominee pursuant to proposed Section 2.16 shall rank such Stockholder Nominees and, in the event the number of Stockholder Nominees submitted by Eligible Stockholders exceeds the Permitted Number, the highest ranking Stockholder Nominee who meets the requirements of proposed Section 2.16 from each Eligible Stockholder will be selected for inclusion in CGM's proxy materials until the Permitted Number is reached, going in order of the amount (largest to smallest) of shares of outstanding capital stock of CGM each Eligible Stockholder disclosed as Owned in its Notice of Proxy Access Nomination. If the Permitted Number is not reached after the highest ranking Stockholder Nominee from each Eligible Stockholder has been selected, then the next highest ranking Stockholder Nominee from each Eligible Stockholder will be selected for inclusion in CGM's proxy materials, and this process will continue as many times as necessary, following the same order each time, until the Permitted Number is reached.

<sup>18</sup> In addition to the items further discussed below, proposed Section 2.16(f) also requires the Notice of Proxy Nomination to include (i) an undertaking that the Eligible Stockholder will assume liability and indemnify CGM in connection with the nomination submitted by the Eligible Stockholder; (ii) in the case of a nomination by an Eligible Stockholder consisting of a group of stockholders, the designation of one group member that is authorized to receive communications, notices, and inquiries from CGM and to act on behalf of members of the group; and (iii) in the case of a nomination by an Eligible Stockholder consisting of a group of stockholders in which two or more funds are intended to be treated as one stockholder, documentation that demonstrates that the funds are part of the same Qualifying Fund Group. See proposed Bylaws Section 2.16(f)(vii)(1)-(2), (viii), and (ix).

Owens and has Owned continuously for the Minimum Holding Period and (2) agreeing to continue to Own the Required Shares through the date of the annual meeting; (ii) one or more written statements from the record holder of the Required Shares (and from each intermediary through which the Required Shares are or have been held during the Minimum Holding Period) verifying that, as of a date within seven calendar days prior to the date the Notice of Proxy Access Nomination is delivered to the CGM Secretary, the Eligible Stockholder Owns, and has Owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder's agreement to provide, within five business days after the record date for the annual meeting, one or more written statements from the record holder and such intermediaries verifying the Eligible Stockholder's continuous ownership of the Required Shares through the record date; (iii) a copy of the Schedule 14N that has been filed with the Commission as required by Rule 14a-18 under the Act;<sup>19</sup> (iv) the information, representations, agreements, and other documents that are required to be set forth in or included with a stockholder's notice of nomination given pursuant to Section 2.11 of the Bylaws; and (v) the written consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected.<sup>20</sup>

The Notice of Proxy Access Nomination must also include a representation that the Eligible Stockholder (1) acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control of CGM, and does not presently have such intent; (2) has not nominated and will not nominate for election to the Board as a director at the annual meeting any person, other than its Stockholder Nominee(s); (3) has not engaged and will not engage in, and has not and will not be a "participant" in another person's, "solicitation" within

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<sup>19</sup> See proposed Bylaws Section 2.16(f)(iii). See also 17 CFR 240.14n-101 and 17 CFR 240.14a-18, which generally require a Nominating Stockholder to provide notice to CGM of its intent to submit a proxy access nomination on a Schedule 14N and file that notice, including the required disclosure, with the Commission on the date first transmitted to CGM.

<sup>20</sup> See proposed Bylaws Section 2.16(f)(i)-(v).



the meaning of Rule 14a-1(l) under the Act in support of the election of any individual as a director at the annual meeting, other than its Stockholder Nominee(s) or a nominee of the Board; (4) has not distributed and will not distribute to any stockholder of CGM any form of proxy for the annual meeting other than the form distributed by CGM; (5) has complied and will comply with all laws, rules and regulations applicable to solicitations and the use, if any, of soliciting material in connection with the annual meeting; and (6) has provided and will provide facts, statements and other information in all communications with CGM and its stockholders that are or will be true and correct in all material respects and do not and will not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.<sup>21</sup>

Proposed Section 2.16(f) further requires the Notice of Proxy Access Nomination to include an undertaking that the Eligible Stockholder file with the Commission any solicitation or other communication with the stockholders of CGM relating to the meeting at which its Stockholder Nominee(s) will be nominated, regardless of whether any such filing is required under Regulation 14A of the Act or whether any exemption from filing is available for such solicitation or other communication under Regulation 14A of the Act.<sup>22</sup>

Finally, proposed Section 2.16(f) requires the Notice of Proxy Access Nomination include a written representation and agreement by the Stockholder Nominee that such person: (1) will act as a representative of all of the stockholders of CGM while serving as a director; (2) will provide facts, statements, and other information in all communications with CGM and its stockholders that are or will be true and correct in all material respects (and shall not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading); (3) is not and will not become a party to (i) any

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<sup>21</sup> See proposed Bylaws Section 2.16(f)(vi)(1)-(6).

<sup>22</sup> See proposed Bylaws Section 2.16(f)(vii). See also 17 CFR 240.14a-1 through 14b-2, which governs solicitations of proxies.

compensatory, payment or other financial agreement, arrangement or understanding with any person or entity other than CGM in connection with service or action as a director of CGM that has not been disclosed to CGM, (ii) any Voting Commitment<sup>23</sup> that has not been disclosed to CGM, or (iii) any Voting Commitment that could reasonably be expected to limit or interfere with the Stockholder Nominee's ability to comply, if elected as a director of CGM, with its fiduciary duties under applicable law; and (4) will abide by and comply with the Bylaws, CGM's Certificate of Incorporation and applicable policies of CGM including all applicable publicly disclosed corporate governance, conflict of interest, confidentiality and stock ownership, and trading policies and guidelines of CGM, as well as the applicable provisions of the rules and regulations of the Commission and any stock exchange applicable to CGM.<sup>24</sup>

Proposed Section 2.16(g) sets forth additional information the Stockholder Nominee must provide in addition to the information required or requested pursuant to proposed Section 2.16(f) or any other provision of the Bylaws and specifies that the Stockholder Nominee(s) must submit all completed and signed questionnaires required of directors and officers of CGM.<sup>25</sup> Additionally, Section 2.16(g) provides that CGM may require any proposed Stockholder Nominee to furnish any information: (1) that may reasonably be requested by CGM to determine whether the Stockholder Nominee would be independent under Section 3.3 of the Bylaws and otherwise qualifies as independent under the rules of the principal national securities exchange on which the outstanding capital stock of CGM is traded; (2) that could be material to a reasonable stockholder's understanding of the independence, or lack thereof, of such Stockholder Nominee; (3) that would be required to satisfy the requirements for qualification of

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<sup>23</sup> A "Voting Commitment" is any agreement, arrangement or understanding with any person or entity as to how the Stockholder Nominee would vote or act on any issue or question as a director. See Notices, supra note 3, at 24055 n.12, 24063 n.12, 24087 n.12, 24079 n.12, 24048 n.12, and 24128 n.12, respectively.

<sup>24</sup> See proposed Bylaws Section 2.16(f)(x).

<sup>25</sup> See proposed Bylaws Section 2.16(g)(i).

directors under applicable foreign regulations; or (4) that may reasonably be requested by CGM to determine the eligibility of such Stockholder Nominee to be included in CGM's proxy materials pursuant to proposed Section 2.16 or to serve as a director of CGM.<sup>26</sup> Proposed Section 2.16(g) further provides that CGM may require the Eligible Stockholder to furnish any other information that may reasonably be requested by CGM to verify the Eligible Stockholder's continuous Ownership of the Required Shares for the Minimum Holding Period and through the date of the annual meeting.<sup>27</sup>

As discussed above, an Eligible Stockholder may, at its option, provide to the Secretary, at the time the Notice of Proxy Access Nomination is provided, one Supporting Statement.<sup>28</sup> Proposed Section 2.16(h) provides that CGM may omit from its proxy materials any information or Supporting Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law, rule or regulation.<sup>29</sup>

Proposed Section 2.16(i) provides that, in the event any information or communications provided by an Eligible Stockholder or a Stockholder Nominee to CGM or its stockholders is not, when provided, or thereafter ceases to be, true and correct in all material respects or omits to state a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading, such Eligible Stockholder or Stockholder Nominee must promptly notify the Secretary of any such defect and of the information that is required to correct

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<sup>26</sup> See proposed Bylaws Section 2.16(g)(ii).

<sup>27</sup> See proposed Bylaws Section 2.16(g)(iii).

<sup>28</sup> See proposed Bylaws Section 2.16(h). See also supra note 10 and accompanying text.

<sup>29</sup> See 17 CFR 240.14a-9 (generally prohibiting proxy solicitations that contain any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading).

any such defect.<sup>30</sup> In addition, an Eligible Stockholder must provide immediate notice to CGM if the Eligible Stockholder ceases to Own any of the Required Shares prior to the date of the annual meeting.<sup>31</sup> Furthermore, any person providing any information to CGM pursuant to proposed Section 2.16(i) must further update and supplement such information, if necessary, so that all such information shall be true and correct as of the (i) record date for determining the stockholders entitled to receive notice of the meeting and (ii) date that is ten business days prior to the meeting (or any postponement, adjournment or recess thereof).<sup>32</sup> However, no notification, update or supplement provided pursuant to proposed Section 2.16(i) or otherwise shall be deemed to cure any defect in any previously provided information or communications or limit the remedies available to CGM relating to such defect (including the right to omit a Stockholder Nominee from its proxy materials).<sup>33</sup>

Proposed Section 2.16(j) sets forth circumstances in which CGM would not be required to include a Stockholder Nominee in its proxy materials for any meeting of stockholders. In such circumstances, any such nomination would be disregarded and no vote on such Stockholder Nominee would occur, notwithstanding that proxies in respect of such vote may have been received by CGM.<sup>34</sup> In particular, CGM would not be required to include a Stockholder Nominee in its proxy materials (i) who would not be an independent director under Section 3.3 of the Bylaws, under the rules of the principal national securities exchange on which the outstanding capital stock of CGM is traded, any applicable rules of the Commission and any

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<sup>30</sup> See proposed Bylaws Section 2.16(i).

<sup>31</sup> See id.

<sup>32</sup> See id., which requires that such update be received by CGM (A) not later than five business days after the record date for determining the stockholders entitled to receive notice of such meeting (in the case of an update required to be made under clause (i)) and (B) not later than seven business days prior to the date for the meeting, if practicable, or, if not practicable, on the first practicable date prior to the meeting or any adjournment, recess or postponement thereof (in the case of an update required to be made pursuant to clause (ii)).

<sup>33</sup> See id.

<sup>34</sup> See proposed Bylaws Section 2.16(j).

publicly disclosed standards used by the Board in determining and disclosing independence of CGM's directors, in each case as determined by the Board in its sole discretion;<sup>35</sup> (ii) who would not meet the audit committee independence requirements under the rules of the principal national securities exchange on which the outstanding capital stock of CGM is traded; (iii) who, if elected, intends to resign as a director of CGM prior to the end of the full term for which he or she is standing for election; (iv) who is or has been subject to any statutory disqualification under Section 3(a)(39) of the Act; (v) who is or has been subject to disqualification under 17 CFR § 1.63; (vi) whose election as a member of the Board would otherwise cause CGM to be in violation of the Bylaws, CGM's Certificate of Incorporation, the rules of the principal national securities exchange on which the outstanding capital stock of CGM is traded, or any applicable law, rule or regulation; (vii) who is or has been, within the past three years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914; (viii) who is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in such a criminal proceeding within the past 10 years; (ix) who is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, as amended; (x) who has provided any information to CGM or its stockholders that was untrue in any material respect or that omitted to state a material fact necessary to make the statements made, in light of the circumstances in which they were made, not misleading; or (xi) if the Eligible Stockholder and/or applicable Stockholder Nominee breaches or fails to comply with its obligations pursuant to the Bylaws, including, but not limited to, proposed Section 2.16 and any agreement, representation or undertaking required by proposed Section 2.16.<sup>36</sup>

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<sup>35</sup> Independence standards adopted by the Board will apply uniformly to all director nominees, including Stockholder Nominees. Any future independence standards adopted by the Board will comply with all applicable laws, rules, and regulations. See Amendment Nos. 1, supra note 4.

<sup>36</sup> See id.

Proposed Section 2.16(k) provides that, notwithstanding anything to the contrary contained in the Bylaws, if (i) a Stockholder Nominee and/or the applicable Eligible Stockholder breaches any of its agreements or representations or fails to comply with any of its obligations under proposed Section 2.16, or (ii) a Stockholder Nominee otherwise becomes ineligible for inclusion in CGM's proxy materials pursuant to proposed Section 2.16, or dies, becomes disabled or otherwise becomes ineligible or unavailable for election at the annual meeting, in each case as determined by the Board or the chairman of the meeting, CGM may omit or, to the extent feasible, remove the information concerning such Stockholder Nominee and the related Supporting Statement from its proxy materials and/or otherwise communicate to its stockholders that such Stockholder Nominee will not be eligible for election at the annual meeting. In addition, in such circumstances CGM will not be required to include in its proxy materials any successor or replacement nominee proposed by the applicable Eligible Stockholder or any other Eligible Stockholder and the chairman of the meeting would declare such nomination to be invalid and such nomination would be disregarded, notwithstanding that proxies in respect of such vote may have been received by CGM.<sup>37</sup>

Proposed Section 2.16(l) provides that any Stockholder Nominee who is included in CGM's proxy materials for a particular annual meeting of stockholders would be ineligible to be a Stockholder Nominee for the next two annual meetings if: (i) the Stockholder Nominee withdraws from or becomes ineligible or unavailable for election at the annual meeting; or (ii) the Stockholder Nominee does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election.<sup>38</sup> This provision would not, however, prevent any stockholder from nominating any person to the Board pursuant to Section 2.11 of the Bylaws.<sup>39</sup>

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<sup>37</sup> See proposed Bylaws Section 2.16(k).

<sup>38</sup> See Notices, supra note 3, at 24057, 24064, 24088, 24081, 24050, and 24130, respectively; proposed Bylaws Section 2.16(l).

<sup>39</sup> See proposed Bylaws Section 2.16(l).

Notwithstanding the provisions of proposed Section 2.16, if the Eligible Stockholder providing notice (or a qualified representative of the Eligible Stockholder)<sup>40</sup> does not appear in person (including virtually, in the case of a meeting held solely by means of remote communication) at the stockholder meeting to present the nomination of such Stockholder Nominee, such proposed nomination shall not be presented by CGM and shall not be transacted, notwithstanding that proxies in respect of such vote may have been received by CGM.<sup>41</sup>

Proposed Section 2.16 of the Bylaws provides that the Board (or any other person or body authorized by the Board) shall have the exclusive power and authority to interpret the provisions of proposed Section 2.16 and make all determinations deemed necessary or advisable in connection with proposed Section 2.16 as to any person, facts or circumstances. All such actions, interpretations, and determinations that are done or made by the Board (or any other person or body authorized by the Board) shall be final, conclusive, and binding on CGM, the stockholders and all other parties.<sup>42</sup>

Finally, proposed Section 2.16(o) states that the proxy access provisions outlined in proposed Section 2.16 shall be the exclusive means for stockholders to include nominees for director in CGM's proxy materials.<sup>43</sup> The Exchanges state that stockholders may continue to propose nominees through other means, but that the Board will have final authority to determine whether to include those nominees in CGM's proxy materials.<sup>44</sup>

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<sup>40</sup> To be considered a qualified representative of the Eligible Stockholder providing notice, a person must be a duly authorized officer, manager or partner of such stockholder or must be authorized by a writing executed by such stockholder or an electronic transmission delivered by such stockholder to act for such stockholder as proxy at the meeting and such writing or electronic transmission, or a reliable reproduction of the writing or electronic transmission, must be provided to CGM at least 24 hours prior to the meeting. See proposed Bylaws Section 2.16(m).

<sup>41</sup> See id.

<sup>42</sup> See proposed Bylaws Section 2.16(n).

<sup>43</sup> See proposed Bylaws Section 2.16(o).

<sup>44</sup> See Notices, supra note 3, at 24057, 24065, 24089, 24082, 24050, and 24130, respectively.

### Proposed Revisions to Other Sections of the Bylaws

The Exchanges have proposed to make additional changes to Sections 2.10 and 2.11 to account for the addition of the proposed proxy access provision. First, the Exchanges propose to add references to Section 2.11 and proposed Section 2.16 in Section 2.10 of the Bylaws to clarify the exact provisions of the Bylaws that set forth requirements relating to stockholder nominees.<sup>45</sup> Second, the Exchanges propose to add references to proposed Section 2.16 and additional language in Section 2.11 of the Bylaws to clarify that only persons who are nominated in accordance with either Section 2.11 or proposed Section 2.16 shall be eligible for election as directors and that Section 2.11 and proposed Section 2.16 of the Bylaws are the exclusive means for a stockholder to make a director nomination.<sup>46</sup>

### III. Discussion and Commission Findings

The Commission finds, after careful review, that the proposed rule changes, as modified by Amendment Nos. 1, are consistent with the requirements of Section 6 of the Act<sup>47</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>48</sup> In particular, the Commission finds that the proposed rule changes, as modified by Amendment Nos. 1, are consistent with the requirements of Section 6(b)(5) of the Act, which requires, among other things, that an exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to

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<sup>45</sup> See id. at 24058, 24065, 24089, 24082, 24050, and 24131, respectively; proposed Bylaws Section 2.10.

<sup>46</sup> See Notices, supra note 3, at 24058, 24065, 24089, 24082, 24050, and 24131, respectively; proposed Bylaws Section 2.11.

<sup>47</sup> 15 U.S.C. 78f(b).

<sup>48</sup> In approving these proposed rule changes, as modified by Amendment Nos. 1, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).



protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers or dealers.<sup>49</sup>

A stockholder who wishes to nominate his or her own candidate for director may initiate a proxy contest in order to solicit proxies from fellow shareholders, but doing so requires the preparation and dissemination of separate proxy materials and entails substantial cost. Proposed Section 2.16 of the Bylaws provides CGM stockholders an alternative path for having their nominees considered through the proxy process. This proposal is intended to respond to a stockholder proposal, submitted under Rule 14a-8 of the Act, requesting that the Board take steps to implement a proxy access bylaw provision.<sup>50</sup>

The Exchanges state that, by permitting an Eligible Stockholder of CGM that meets the stated requirements to nominate directors and have its nominees included in CGM's annual meeting proxy statement,<sup>51</sup> the proposal would strengthen the corporate governance of CGM, which the Exchanges believe is beneficial to both investors and the public interest.<sup>52</sup> The Commission believes that the proposal to provide a process for stockholder proxy access in the Bylaws should help to provide the stockholders of CGM that meet the stated requirements of proposed Section 2.16 with an alternative opportunity to exercise their right to nominate directors for the Board, consistent with the Act.

The proposed rule changes, as modified by Amendment Nos. 1, would require CGM to include in its proxy materials information regarding the Stockholder Nominee and the Eligible

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<sup>49</sup> 15 U.S.C. 78f(b)(5).

<sup>50</sup> See supra note 5 and accompanying text. The Exchanges state that after receiving this stockholder proposal related to proxy access, CGM determined to take the stockholder's requested steps to implement proxy access. See supra note 6 and accompanying text.

<sup>51</sup> As discussed above, however, the Permitted Number of Stockholder Nominees under proposed Section 2.16 may not exceed the greater of two or 20% of the total number of directors in office, and under certain circumstances, could be less than two Stockholder Nominees. See proposed Bylaws Section 2.16(c). See also supra notes 16-17 and accompanying text.

<sup>52</sup> See Notices, supra note 3, at 24058, 24065, 24089, 24082, 24051, and 24131, respectively.

Stockholder, including the Required Information, any Supporting Statement, and any other information CGM determines to include relating to the Stockholder Nominee or the Eligible Stockholder.<sup>53</sup> The Commission believes that the provision of such information could help stockholders to assess whether a nominee submitted pursuant to proposed Section 2.16 possesses the necessary qualifications and experience to serve as a director.

The proposed rule changes to the Bylaws limit the availability of proxy access in certain circumstances. For example, in order to be eligible to submit a nomination to be included in the proxy statement pursuant to proposed Section 2.16, a stockholder (or a group of no more than 20 stockholders) is required to own at least three percent of CGM's outstanding shares of capital stock continuously for at least three years.<sup>54</sup> Furthermore, a stockholder may only nominate a director to be included in the proxy materials pursuant to proposed Section 2.16 if the stockholder represents that he or she acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control of CGM, and does not presently have such intent.<sup>55</sup> The proposal also limits the number of director nominees submitted pursuant to proposed Section 2.16 that may be included in the proxy statement to the greater of two or 20% of the total number of directors of the Board.<sup>56</sup> The proposal would allow CGM to disregard or omit director nominees submitted pursuant to proposed Section 2.16 from the proxy materials in certain circumstances, including when the Stockholder Nominee has provided any information to CGM or its stockholders that was untrue in any material respect or that omitted to state a material fact necessary to make the statements made, in light of the circumstances in

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<sup>53</sup> See proposed Bylaws Section 2.16(a). See also supra notes 10-11 and accompanying text.

<sup>54</sup> See proposed Bylaws Section 2.16(f)(vi)(1). See also supra notes 13-15 and accompanying text.

<sup>55</sup> See proposed Bylaws Section 2.16(d). See also supra note 21 and accompanying text.

<sup>56</sup> See proposed Bylaws Section 2.16(c). See also supra notes 8, 16, and 17 and accompanying text.

which they were made, not misleading.<sup>57</sup> Such limitations on proxy access seem designed to balance the ability of CGM stockholders to participate more fully in the nomination and election process against the potential cost and practical difficulties of requiring inclusion of stockholder nominations in proxy materials.

As discussed above, the proposed proxy access provisions include safeguards that will help to ensure that any director nominees submitted pursuant to proposed Section 2.16 would qualify as independent directors and that the nominating shareholder's nomination of the nominee, and the nominee's membership on the Board, if elected, would not violate any applicable laws, rules or regulations of any government entity or relevant self-regulatory organization. Specifically, the proposal permits CGM to disregard and omit from the proxy materials any nominee whose election as a member of the Board would cause CGM to be in violation of the Bylaws, CGM's Certificate of Incorporation, the rules of the principal national securities exchange on which CGM's capital stock is traded, or any applicable law, rule or regulation.<sup>58</sup> CGM may also disregard or omit from the proxy materials any nominee who would not be an independent director under the Bylaws, the rules of the principal national securities exchange on which CGM's capital stock is traded,<sup>59</sup> any applicable rules of the Commission, or

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<sup>57</sup> See proposed Section 2.16(j)(x). See also supra notes 34-36 and accompanying text.

<sup>58</sup> See proposed Bylaws Section 2.16(j)(vi). See also supra notes 34-36 and accompanying text.

<sup>59</sup> The Commission notes that CGM's capital stock is listed on BZX and BZX is also currently the principal market on which CGM's stock is traded. The Exchange has represented to Commission staff that for purposes of proposed Bylaws Section 2.16, the terms "listed" and "traded" have no meaningful difference in this context. The Commission notes that the national securities exchange that lists a security is the relevant exchange for compliance with listing standards including independence requirements. Although CGM's listing market is currently also the principal market on which its stock is traded, for the avoidance of confusion, the Commission believes CGM should amend this provision of its Bylaws to provide that CGM must comply with the listing standards of its listing market, including the independence requirements of its listing market, rather than those of the principal market on which its stock is traded, which market may change over time. See, e.g., Bylaws Section 3.3 ("At all times no less than two-thirds of the members of the Board of Directors shall satisfy the independence requirements adopted by the Board of Directors for directors of [CGM], as may be modified and amended by the Board of Directors from time to time, and which shall satisfy the independence

any publicly disclosed standards used by the Board in determining and disclosing independence of CGM's directors.<sup>60</sup> The Exchanges have represented that any independence standards adopted by the Board will apply uniformly to all director nominees, including Stockholder Nominees, and that any future independence standards adopted by the Board will comply with all applicable laws, rules, and regulations.<sup>61</sup>

In addition, the Stockholder Nominee must provide a written representation and agreement that, among other things, the nominee (i) is not and will not become a party to any Voting Commitment that has not been disclosed to CGM or any Voting Commitment that could reasonably be expected to limit or interfere with the Stockholder Nominee's ability to comply, if elected as a director of CGM, with its fiduciary duties under applicable law, and (ii) will abide by and comply with the Bylaws, CGM's Certificate of Incorporation and applicable policies of CGM, including all applicable publicly disclosed corporate governance, conflict of interest, confidentiality and stock ownership and trading policies and guidelines of CGM, as well as the applicable provisions of the rules and regulations of the Commission and any stock exchange applicable to CGM.<sup>62</sup>

The Commission believes that the safeguards and limitations described above, including the representations set forth in Amendment Nos. 1, should help to ensure that CGM can comply with its Bylaws and any applicable laws, rules, regulations, including, among others, exchange listing standards on independent directors, consistent with Section 6(b)(5) of the Act. The Commission further believes that the representations set forth in Amendment Nos. 1 will help to ensure that any independence standards adopted by the Board will apply uniformly among both

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requirements contained in the listing standards of each national securities exchange on which the common stock of [CGM] is listed.") (emphasis added).

<sup>60</sup> See proposed Bylaws Section 2.16(j)(i). See also supra notes 34-36 and accompanying text.

<sup>61</sup> See Amendment Nos. 1, supra note 4.

<sup>62</sup> See proposed Bylaws Section 2.16(f)(x). See also supra note 24 and accompanying text.

Stockholder Nominees and Board nominees, consistent with Section 6(b)(5) of the Act. Based on the foregoing, the Commission finds that the proposed rule changes, as modified by Amendment Nos. 1, are consistent with the Act.

Finally, the Commission finds that the proposed conforming changes to Sections 2.10 and 2.11 of the Bylaws are consistent with the Act because these changes prevent stockholder confusion by clarifying the operation of the proposed proxy access provision and other provisions by which stockholders may nominate directors to the Board.

#### IV. Solicitation of Comments on Amendment Nos. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule changes, as modified by Amendment Nos. 1, are consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Nos. SR-CBOE-2021-023; SR-CboeBYX-2021-009; SR-CboeBZX-2021-028; SR-CboeEDGA-2021-009; SR-CboeEDGX-2021-021; SR-C2-2021-007 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Nos. SR-CBOE-2021-023; SR-CboeBYX-2021-009; SR-CboeBZX-2021-028; SR-CboeEDGA-2021-009; SR-CboeEDGX-2021-021; SR-C2-2021-007.

These file numbers should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method.

The Commission will post all comments on the Commission's Internet website

(<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission,

and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filings also will be available for inspection and copying at the principal office of the Exchanges. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Nos. SR-CBOE-2021-023; SR-CboeBYX-2021-009; SR-CboeBZX-2021-028; SR-CboeEDGA-2021-009; SR-CboeEDGX-2021-021; SR-C2-2021-007, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Changes, as Modified by Amendment Nos. 1

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act, to approve the proposed rule changes, as modified by Amendment Nos. 1, prior to the 30th day after the date of publication of Amendment Nos. 1 in the Federal Register. As discussed above, in Amendment Nos. 1 the Exchanges clarify the circumstances under which Stockholder Nominees may be excluded from the proxy materials by representing that any publicly disclosed standards used by the Board in determining and disclosing independence of CGM's directors will apply uniformly to all director nominees, including Stockholder Nominees, and will comply with all applicable laws, rules, and regulations.<sup>63</sup> The Commission believes that these revisions provide needed clarity to the proposed rule changes and help to ensure the proposal is consistent with investor protection under Section 6(b)(5) of the Act. Accordingly, the Commission finds good

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<sup>63</sup> See Amendment Nos. 1, supra note 4.

cause for approving the proposed rule changes, as modified by Amendment Nos. 1, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.<sup>64</sup>

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>65</sup> that the proposed rule changes (SR-CBOE-2021-023; SR-CboeBYX-2021-009; SR-CboeBZX-2021-028; SR-CboeEDGA-2021-009; SR-CboeEDGX-2021-021; SR-C2-2021-007), as modified by Amendment Nos. 1, be, and hereby are, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>66</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2021-16796 Filed: 8/5/2021 8:45 am; Publication Date: 8/6/2021]

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<sup>64</sup> 15 U.S.C. 78s(b)(2).

<sup>65</sup> 15 U.S.C. 78s(b)(2).

<sup>66</sup> 17 CFR 200.30-3(a)(12).